



**NEVADA COMMISSION ON ETHICS  
EXECUTIVE DIRECTOR'S REPORT AND RECOMMENDATION  
REGARDING JUST AND SUFFICIENT CAUSE**

REQUESTS FOR OPINION NO.  
07-07C

SUBJECT: DONNA BAILEY, MEMBER  
BOARD OF EUREKA COUNTY COMMISSIONERS

**A. JURISDICTION:**

In her capacity as a member of the Board of Eureka County Commissioners, Donna Bailey is a public officer as defined by NRS 281.4365. As such, the Nevada Commission on Ethics has jurisdiction over this complaint.

**B. REPORT OF INVESTIGATIVE ACTIVITIES:**

- Reviewed Request for Opinion (complaint) 07-07C received February 6, 2007 from Cleve Mallory, including the following (TAB B):
  - Agenda and Minutes of the July 20, 2006 meeting of the Board of Eureka County Commissioners
  - Audio recording of the July 20, 2006 meeting of the Board of Eureka County Commissioners
- Transcribed the salient segments of the audio recording of the July 20, 2006 meeting of the Board of Eureka County Commissioners (TAB C)
- Reviewed *Waivers of Statutory Time Requirement* received February 20, 2006 and response submitted February 28, 2006 on behalf of Donna Bailey, by and through her attorney, Eureka County District Attorney Theodore Beutel, Esq., including the following documents (TAB D):
  - Affidavit of Donna Bailey dated February 26, 2007
  - Affidavit of Publication for legal public notice of request for proposals for Eureka Fairgrounds fence project, published July 6, 2006
  - Proposal submitted to Eureka County by Marshall & Sons on July 13, 2006
  - Agenda and Minutes of the July 20, 2006 meeting of the Board of Eureka County Commissioners
  - Contract for independent contractor for fencing services between Eureka County and Marshall & Sons
- Reviewed the Agendas and Minutes from the April 6, 2006 & July 20, 2006 meetings of the Board of Eureka County Commissioners (TAB E)

- Reviewed response submitted April 25, 2007 from Donna Bailey, by and through her attorney, Eureka County District Attorney Theodore Beutel, Esq., regarding the April 11, 2007 *Notice of Additional Issues and Facts* sent to her by the Executive Director of the Commission on Ethics. Her response includes the following (TAB F):
  - Supplemental affidavit of Donna Bailey
  - Affidavit of Publication
  - Request for Proposals
  - Bids received from Marshall & Sons and the Baumanns – March 10, 2006
  - Board of Eureka County Commissioners Agenda, Minutes & audio recording – March 20, 2006
  - Board of Eureka County Commissioners Agenda, Minutes, audio recording, and partial transcript prepared by the clerk of the board – April 6, 2006 March 20, 2006
  - Department of Public Works (DWP) letter to Marshall & Sons – April 7, 2006
  - Board of Eureka County Commissioners Agenda, Minutes, & audio recording – April 20, 2006
  - Affidavit of Kim Todd
- Reviewed consanguinity chart and related Commission on Ethics opinions (TAB G)

**C. RECOMMENDATIONS:**

Based on the results of investigation, it is recommended that the Panel find that just and sufficient cause **DOES NOT EXIST** for the Commission to hold a hearing and render an opinion in this matter relating to the provisions of:

- NRS 281.481(2)

**SPECIFIC REASON:**

Sufficient credible evidence does not exist to support a finding of just and sufficient cause for the Commission to hear the matter and render an opinion on whether Ms. Bailey violated the provisions of NRS 281.481(2).

Based on the results of investigation, it is recommended that the Panel find that just and sufficient cause **DOES EXIST** for the Commission to hold a hearing and render an opinion in this matter relating to the provisions of:

- NRS 281.501(2)
- NRS 281.501(4)

**SPECIFIC REASON:**

Sufficient credible evidence exists to support a finding of just and sufficient cause for the Commission to hear the matter and render an opinion on whether Ms. Bailey violated the provisions of NRS 281.501(2) and NRS 281.501(4).

**D. SUMMARY OF REQUEST FOR OPINION (COMPLAINT):**

The complaint, submitted by Cleve Mallory, alleges violations of NRS 281.481(2), NRS 281.501(2) and NRS 281.501(4) by Ms. Bailey. The following is the substance of the complaint:

During the Eureka County board of commissioners meeting held on July 20, 2006, Ms. Bailey participated in a vote to award a county contract to her nephew. It was not until after the unanimous vote by the three commissioners was taken that Ms. Bailey disclosed that the contract was awarded to her nephew. Eureka County District Attorney Ted Beutel told Ms. Bailey that she could either vote or abstain. Ms. Bailey changed her vote to an abstention.

Ms. Bailey has helped hire several of her family members for county jobs and cheap rent on county buildings.

**E. SUMMARY OF SUBJECT'S RESPONSE:**

Ms. Bailey submitted a *Waiver of Statutory Time Requirement* and a response by and through her attorney, Eureka County District Attorney Theodore Beutel. The following is the substance of that response:

Prior to July 6, 2006, the Eureka County Department of Public Works (DPW) prepared a Request for Proposal (RFP) bidder packet to invite contractors to bid on a fencing replacement project. On July 6, the RFP was published in the *Eureka Sentinel* newspaper.

On July 13, 2006, DPW received a bid from Marshall & Sons to perform the work. No other bids were received. On July 20, DPW Director Ron Damele presented information to the Board regarding the response to the RFP. Mr. Damele explained to the Board that two prospective contractors requested bidder packets, but only one proposal was submitted.

Discussion ensued between Commissioners Dave Pastorino and Ken Benson regarding the contract details. Mr. Benson made a motion to approve the contract with Marshall & Sons, and Mr. Pastorino seconded the motion. Then Chairwoman Bailey called for the vote, and the three-member Board voted unanimously in favor of the contract.

Immediately thereafter, Ms. Bailey questioned whether she was able to vote. District Attorney Beutel replied that Ms. Bailey may state her conflict and still vote or choose to abstain. Ms. Bailey explained the contractor is her nephew, and she decided to record her action as abstaining from the vote.

The minutes of the July 20, 2006 meeting describe the action taken as follows:

“Eureka Fairgrounds Fence Project: Public Works Director Ron Damele reported that Public Works had advertised the fencing project for two weeks. Two proposal packets were requested and sent out. One was received back from Reese Marshall & Sons. Mr. Damele walked the site with Mr. Marshall and felt he had a good understanding of the project. Mr. Damele stated that this job was mostly perimeter fencing, and added that the scope of the job had been expanded to include the portion of the fence around the chute where red panels are currently being used. The County will provide the bulk of materials, to include posts, lodge poles, gates, and lever latch panels; and the contractor will provide all labor, bands, bolts, attaching hardware, cement, and gate hinges. Funding for this project will be from the maintenance fund for the Fairgrounds, as budgeted.

Commissioner Benson moved to approve a contract with Reese Marshall & Sons to complete the fencing work at the Fairgrounds at a cost of \$3.15 per linear ft. for removal and \$3.65 per linear ft. for installation for a total of 1200 feet. Commissioner Pastorino seconded the motion. Motion carried 2/0. Chairwoman Bailey abstained since Mr. Marshall is her nephew.”

Eureka County and Marshall & Sons signed the contract for the fencing project on the same day that the board of commissioners voted its approval.

NRS 281.501(4) mandates disclosure where a public officer has a “commitment in a private capacity to the interests of others.” The disclosure of that interest is mandated at the time the matter is considered, and that is precisely what Ms. Bailey did.

While abstention is required if the subject’s independent judgment is materially affected by private commitments, there is no prohibition against abstention in other instances (*Woodbury*, COE 99-56). Based upon the facts, Ms. Bailey could have also voted in favor of awarding the contract, but was justifiably concerned the public may look upon the vote with disfavor, so she chose to abstain.

Given the circumstances, Ms. Bailey did everything in her power to act ethically, state the conflict, and proceed with the business at hand.

The complaint also alleges that Ms. Bailey has helped hire “a lot of her family members” and provided them “cheap rent on county buildings.” No fact or evidence is included to support this allegation, so no response is offered.

Ms. Bailey asserts the following points in her affidavit dated February 26, 2007:

- Mr. Marshall is her husband’s nephew (her nephew by marriage);
- She exerted no influence with DPW drafting, distributing, or publishing of the RFP materials for the fencing contract;

- She had no influence or knowledge of the bids received by DPW until the July 20, 2006 meeting of the board of county commissioners;
- She was unaware that her nephew was the sole bidder until the July 20, 2006 meeting;
- During the deliberation, she did not advocate a position on the matter;
- She sought and relied in good faith on the advice of counsel when she realized the conflict;
- She was unable to obtain an opinion from the Commission on Ethics because she was unaware of the identity of the sole bidder until this agenda item was presented and believes she did not take action contrary to prior opinions;
- She obtained no personal pecuniary interest or benefit from the contract award, and the benefits and detriments accruing to her in awarding this contract are identical to the benefits and detriments accruing to the other board members.

**F. ADDITIONAL ISSUES AND FACTS:**

Additional issues and facts were discovered during the course of the complaint investigation relating to the requirements of NRS 281.481(2) and NRS 281.501(2) and NRS 281.501(4). Specifically, Ms. Bailey had participated in a vote to approve an item on the April 6, 2006 meeting agenda of the Board of Eureka County Commissioners. As reported in the minutes of the meeting, two applications were received for independent contractor bids for the Eureka County cricket abatement program from Ms. Bailey's nephew, Reese Marshall, and Jim & Vera Baumann. Neither the minutes nor the audio recording of the meeting indicate that Ms. Bailey disclosed her relationship with Mr. Marshall at any time during the meeting. Commissioner Benson made a motion to accept the Baumanns' proposal. Although not noted in the minutes of the April meeting, the meeting audio recording obtained from the Eureka County Clerk/Treasurer's Office indicates that Commissioner Pasterino seconded the motion by Commissioner Benson, and the motion carried unanimously with a vote of 3-0. Those voting were Commissioners Benson, Pasterino and Bailey.

Pursuant to NAC 281.189, the Executive Director of the Commission on Ethics sent a letter, on April 13, 2007, notifying Ms. Bailey of the additional relevant issues and facts related to the April 6, 2006 meeting.

**G. SUMMARY OF SUBJECT'S RESPONSE:**

On April 23, 2007, Ms. Bailey submitted a supplemental response to the *Notice of Additional Issues and Facts*, through District Attorney Theodore Beutel. The following is a summary of that supplemental:

Prior to February 10, 2006, the Eureka County Department of Public Works (DPW) prepared a Request for Proposal (RFP) bidder packet to invite contractors to bid on a cricket abatement project for Eureka County. On February 10, the RFP was published in the *Eureka Sentinel* newspaper.

On March 10, 2006, DPW received bids from Marshall & Sons and James and Vera Baumann to perform the work.

On April 6, 2006, DPW Director Ron Damele presented information to the board of commissioners regarding the details of each bid. Mr. Damele recommended a contract be awarded to the Baumanns. Commissioner Benson moved to award the contract to the Baumanns, and Commissioner Pastorino seconded the motion. Ms. Bailey conducted the vote, and the board of commissioners voted unanimously, without discussion, in favor of the contract to the Baumanns.

The bid by Marshall & Sons was never discussed outside the presentation to the board at the meeting. On April 7, 2006, DPW sent a letter to Marshall & Sons to inform them that the bid from the Baumanns was accepted.

On April 20, 2006, the board of commissioners approved the contract between Eureka County and the Baumanns for cricket abatement.

Ms. Bailey had no interest, other than the fact that the unsuccessful bidder is her husband's sister's son, that would materially affect her independence of judgment regarding the contract award. Ms. Bailey did not advocate a contract award, and the board did not discuss, deliberate or act on the bid submitted by the conflicted party.

Ms. Bailey did not need to seek the advice of counsel or disclose a conflict while the matter was under consideration because, at no time, did the board discuss or deliberate or otherwise act on the bid submitted by Marshall & Sons; thus, the lower bidder obtained the contract. Disclosure in this instance could still have been made, but there is no other issue for conflict other than the relationship in the third degree of affinity, and her nephew's bid was not discussed or deliberated upon. There is little positive impact to the public's trust in requiring a disclosure where the bid by a conflicted party is never entertained or acted upon by the board.

For the reasons stated, sufficient credible evidence does not exist to support a finding of just and sufficient cause for the Commission on Ethics to hear this supplemental matter and render an opinion. No allegation or evidence of any fact exists that supports a potential violation by the subject of N.R.S. Chapter 281. In each instance, the subject acted ethically to preserve the public's trust.

Ms. Bailey makes essentially the same assertions in her supplemental affidavit as in her first affidavit dated February 26, 2007 except that, in this instance, she did not seek advice from counsel. Ms. Bailey states that it never occurred to her to make a disclosure of a conflict of interest since the board never contemplated or discussed the possibility of awarding the contract to her nephew.

## **H. RELEVANT STATUTES:**

**NRS 281.481 General requirements; exceptions.** A code of ethical standards is hereby established to govern the conduct of public officers and employees:

\* \* \* \* \*

2. A public officer or employee shall not use his position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for himself, any business entity in which he has a significant pecuniary interest, or any person to whom he has a commitment in a private capacity to the interests of that person. As used in this subsection:

(a) "Commitment in a private capacity to the interests of that person" has the meaning ascribed to "commitment in a private capacity to the interests of others" in subsection 8 of NRS 281.501.<sup>1</sup>

(b) "Unwarranted" means without justification or adequate reason.

\* \* \* \* \*

**NRS 281.501 Additional standards: Voting by public officers; disclosures required of public officers and employees; effect of abstention from voting on quorum; Legislators authorized to file written disclosure.**

\* \* \* \* \*

2. Except as otherwise provided in subsection 3, in addition to the requirements of the code of ethical standards, a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by:

(a) His acceptance of a gift or loan;

(b) His pecuniary interest; or

(c) His commitment in a private capacity to the interests of others.<sup>2</sup>

➔ It must be presumed that the independence of judgment of a reasonable person would not be materially affected by his pecuniary interest or his commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to him or to the other persons whose interests to which the member is committed in a private capacity is not greater than that accruing to any other member of the general business, profession, occupation or group. The presumption set forth in this subsection does not affect the applicability of the requirements set forth in subsection 4 relating to the disclosure of the pecuniary interest or commitment in a private capacity to the interests of others.

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4. A public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon any matter:

(a) Regarding which he has accepted a gift or loan;

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<sup>1, 2</sup> **NRS 281.501(8):** As used in this section, "commitment in a private capacity to the interests of others" means a commitment to a person:

(a) Who is a member of his household;

(b) Who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity;

(c) Who employs him or a member of his household;

(d) With whom he has a substantial and continuing business relationship; or

(e) Any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection.

(b) Which would reasonably be affected by his commitment in a private capacity to the interest of others; or

(c) In which he has a pecuniary interest,

↳ without disclosing sufficient information concerning the gift, loan, commitment or interest to inform the public of the potential effect of the action or abstention upon the person who provided the gift or loan, upon the person to whom he has a commitment, or upon his interest. Except as otherwise provided in subsection 6, such a disclosure must be made at the time the matter is considered. If the officer or employee is a member of a body which makes decisions, he shall make the disclosure in public to the Chairman and other members of the body. If the officer or employee is not a member of such a body and holds an appointive office, he shall make the disclosure to the supervisory head of his organization or, if he holds an elective office, to the general public in the area from which he is elected. This subsection does not require a public officer to disclose any campaign contributions that the public officer reported pursuant to NRS 294A.120 or 294A.125 in a timely manner.

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## **I. RESULTS OF INVESTIGATION:**

The minutes and audio recordings of the April 6, 2006 and July 20, 2006 meetings of the Board of Eureka County Commissioners indicate that Ms. Bailey conducted and participated in board decisions involving independent contractor services provided or potentially provided to Eureka County by Reese Marshall, her nephew by marriage. The record indicates that, at the April 6 meeting, the board was presented a bid for cricket abatement services submitted by Marshall & Sons. Ms. Bailey made no public disclosure of her relationship to Reese Marshall. The record indicates that, at the July 20 meeting, the board accepted a bid from Marshall & Sons to replace fencing at the Eureka County fairgrounds. Only after the vote was taken did Ms. Bailey disclose her relationship to Reese Marshall.

On April 7, 2007, the requester was contacted by me regarding his allegation in the complaint that Ms. Bailey has helped hire several of her family members for county jobs and given family members cheap rent on county buildings. Although he gave me a few names and instances of contracts or rental agreements, he had no credible evidence to substantiate his very broad allegation.

## **J. CONCLUSION:**

### ***Allegations regarding NRS 281.481(2):***

There is no evidence that Ms. Bailey used her position to secure or grant unwarranted privileges, preferences, exemptions or advantages for her nephew. In each instance, the evidence indicates that she was involved with the contract process only during the public meetings when bids were presented to the board of county commissioners for its decision. Furthermore, the cricket abatement contract was not awarded to her nephew. Her nephew was the only bidder for the fence replacement contract.

The Executive Director finds that there is no credible evidence to substantiate a potential violation of NRS 281.481(2). Accordingly, the Executive Director recommends that the panel



find just and sufficient cause **DOES NOT EXIST** for the Commission to hold a hearing and render an opinion regarding whether Ms. Bailey violated the provisions of NRS 281.481(2).

***Allegations regarding NRS 281.501(2) & NRS 281.501(4):***

NRS 281.501(2) states that a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by his commitment in a private capacity to the interests of others. "Commitment in a private capacity to the interests of others" means a person who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity.

Ms. Bailey is related to Mr. Marshall within the third degree of affinity. In the instance of the contract for fence replacement, Ms. Bailey voted to accept the bid submitted by her nephew, Mr. Marshall.

NRS 281.501(4) states that a public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon any matter which would reasonably be affected by his commitment in a private capacity to the interest of others, without disclosing sufficient information concerning the commitment, in order to inform the public of the potential effect of the action or abstention upon the person to whom he has a commitment. If the officer is a member of a body that makes decisions, he shall make the disclosure in public to the chairman and other members of the body.

In the instance of the cricket abatement contract that was considered by the board of commissioners at its April 6, 2006 meeting, Ms. Bailey voted, but never disclosed that she was related to one of the bidders, Mr. Marshall. In the instance of the fence replacement contract that was considered by the board of commissioners at its July 20, 2006 meeting, Ms. Bailey voted, disclosed, and then replaced her vote with an abstention. Notwithstanding her disclosure and abstention, she acted on the matter before she disclosed.

As to the instance that occurred at the July meeting, the Executive Director finds that there is credible evidence to substantiate a violation of NRS 281.501(2). As to both instances that occurred at the April and July meetings, respectively, the Executive Director finds that there is credible evidence to substantiate a potential violation of NRS 281.501(4). Accordingly, the Executive Director recommends that the panel find just and sufficient cause **DOES EXIST** for the Commission to hold a hearing and render an opinion regarding whether Ms. Bailey violated the provisions of NRS 281.501(2) and NRS 281.501(4).

Prepared by: Matt C. DiOrio DATED: May 8, 2007

MATT C. DI ORIO  
SENIOR INVESTIGATOR

Approved by: L. Patrick Hearn DATED: 5/8/07

L. PATRICK HEARN  
EXECUTIVE DIRECTOR